

# Review of Enforcement Measures

## Enforcement of National Implementing Legislation

With the Convention in effect for less than five months, it was not expected that there would be significant enforcement activities to report among the first group of eleven parties whose implementing legislation we have reviewed. We are not, at this time, aware of any prosecution by another party to the Convention for bribes to foreign public officials.

Enforcement of implementing legislation, however, is an important part of U.S. Government monitoring of the Convention and will be followed closely. Reviewing enforcement is also part of the mandate of the OECD Working Group on Bribery, which has responsibility for monitoring all signatories' implementation of the Convention. Future reports should provide more detailed information on enforcement activities as governments begin to confront cases involving bribery of foreign public officials and a record of enforcement action develops. In the meantime, we are focusing our attention and resources on analyzing the implementing legislation of those signatories that have ratified the Convention and encouraging other signatories to put the Convention into effect as soon as possible.

In the United States, FCPA investigations of the bribery of foreign public officials are subject to the same rules

and principles as govern any federal criminal or SEC civil investigation. A prosecutor is required, as always, to make an initial assessment of the merits of the case, the likelihood of obtaining sufficient evidence to obtain a conviction, and the availability of sufficient investigative and prosecutorial resources. Political or economic interests are not relevant to this decision. To ensure that uniform and consistent prosecutorial decisions are made in this particular area, all FCPA investigations are supervised by the Criminal Division of the U.S. Department of Justice. Similarly, political or economic interests are not relevant to the SEC's decisions to investigate or bring cases to enforce the civil provisions of the FCPA against issuers.

In the twenty-two years since the passage of the FCPA, the Department of Justice has brought approximately thirty criminal prosecutions\* and five civil injunctive actions. In addition, the SEC has brought several civil enforcement actions against issuers for violations of the antibribery provisions and numerous actions for violations of the books and records provisions of the FCPA. In 1998, the Department brought five FCPA prosecutions, resulting in a fine against one cor-

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\*In addition, there have been several cases where the absence of dual criminality has made it difficult to obtain foreign evidence for use in an FCPA prosecution, and charges were therefore brought under other federal criminal statutes.

poration of \$1.4 million and individual fines against four individuals ranging from \$1,500 to \$20,000. In addition, two defendants were sentenced to terms of imprisonment.

The Department of Justice has also provided assistance to American businesses who have been in the process of negotiating international business transactions. Since 1980, the Department has issued thirty-three opinions in response to requests from American businesses stating whether it would take enforcement action if the businesses proceeded with actual proposed transactions. In addition, since 1992 the Department of Justice and the Department of Commerce have made available to U.S. exporters a joint brochure that explains the anti-bribery provisions of the FCPA.

### **Efforts to Promote Public Awareness**

Efforts to promote public awareness of the Convention and domestic laws on bribery of foreign public officials vary widely among the signatory countries. The United States, for its part, has undertaken an intensive campaign to educate the business community and the general public about international bribery and the requirements of U.S. law and the Convention. U.S. companies engaged in international trade are generally aware of the FCPA. Since U.S. ratification of the Convention and the passage of the IAFCA, the Clinton Administration has sought to raise public awareness of U.S. policy on bribery and initiatives to expand cooperation on eliminating bribery in the international marketplace.

Secretary of Commerce William Daley has repeatedly spoken out against international bribery to business audiences and urged support for the Convention. Other senior government officials, including Commerce Under Secretary and former U.S. Ambassador to the OECD David Aaron and Commerce General Counsel Andrew J. Pincus, Treasury Secretary Robert Rubin, and Under Secretary of State Stuart Eizenstat, have also highlighted the importance of antibribery initiatives for both protecting U.S. business and promoting good governance in countries where bribery may occur. As part of this outreach program, the Commerce Department provides in several of its Internet websites detailed information on the Convention, relevant U.S. laws, and the wide range of U.S. international activities to combat bribery. Officials of the Commerce, State, and Justice Departments are also in regular contact with business representatives to brief them on new developments relating to antibribery issues and discuss problems they encounter in their operations (See Chapter 8, Private Sector Review for more information on U.S. government outreach initiatives on bribery.)

No other signatory to the Convention has undertaken as extensive a public affairs effort on combating bribery as the United States. Several countries, however, have taken initiatives to promote public awareness on the need to fight corruption and reduce bribery in business transactions at home and abroad. In Sweden, both the Trade and Justice Ministers have spoken out on corruption and highlighted the progress made under the Convention. To help promote public awareness of the government's anticorruption campaign, the government plans to appoint a senior official to serve as an anticorruption ambassador. Swedish trade officials also met with Commerce Department representatives recently to discuss the two countries' efforts to promote implementation of the Convention and anticorruption initiatives more broadly, including in the World Trade Organization.

In Poland, President Aleksandr Kwasniewski hosted an international conference on fighting corruption in March 1999, and Polish Deputy Prime Minister and Finance Minister Leszek Balcerowicz has actively supported the activities of nongovernmental organizations that are working for openness and integrity in government. The government of Korea has published extensive material on the Convention and its implementing legislation and held numerous seminars on these subjects. In France, Minister of Economy Dominique Strauss-Kahn addressed a business conference on international corruption in Paris on April 13, 1999, noting France's determination to combat corruption in international trade and its support for the Convention.

Nongovernmental organizations are playing an important role in raising public awareness of corruption and the need for effective remedies. Transparency International, a nongovernmental organization committed to promoting good governance and fighting bribery and corruption, is active in more than 70 countries around the world, including most signatories of the Convention. In Canada, Transparency International and the International Center for Criminal Law Reform and Criminal Justice Policy organized a private sector seminar in Vancouver February 4–5, 1999, to review the Convention and recent international developments on corruption and bribery. Other Canadian nongovernmental organizations are planning additional events for later in the year.

The Transparency International chapter in Poland will hold a conference on fighting corruption in the next several months. The Australian chapter is scheduling seminars this summer in Sydney, Melbourne, and Brisbane to brief the business representatives on anti-

corruption initiatives. In Bulgaria, fifteen nongovernmental organizations have joined together to form Coalition 2000, an advocacy group devoted to fighting corruption. Coalition 2000 is developing an anticorruption action plan and publicizing the Convention. It has its own Internet website with links to the OECD website and the text of the Convention.

In addition to the United States, the following fourteen signatories to the Convention have posted their national implementing legislation or draft legislation on their government's website and/or the OECD Anticorruption Unit website: Australia, Austria, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Korea, the Netherlands, New Zealand, Norway, and Switzerland. (See Appendix F.)

## **Monitoring Process for the Convention**

The monitoring process is crucial for promoting effective implementation and enforcement of the Convention by signatory countries. The OECD has developed a comprehensive monitoring process which provides for input from the private sector and nongovernmental organizations. The U.S. government has established an intensive monitoring process, of which these annual reports to the Congress are an integral part. We are encouraging all signatories to participate fully in the OECD monitoring process and establish their own internal mechanisms for ensuring follow-through on the Convention by governments and the private sector. We have also stressed the importance of their devoting sufficient resources to ensure the monitoring process is effective.

### **OECD Monitoring**

The OECD has established a rigorous process to monitor implementation and enforcement of the Convention. Our experience with the first stage of the process confirms that it is a serious undertaking that will encourage parties to fulfill their obligations under the Convention.

Evaluating implementation of the Convention is a challenging project given the diverse legal systems of signatory countries. The OECD review process seeks to accommodate these differences by focusing on the functional equivalence of measures and the identification of the strengths and weaknesses of the various approaches to implementation. The effectiveness of this process will be demonstrated by the willingness of signatories to correct weaknesses identified in their implementation and enforcement regimes after their legislation has undergone the review process.

### **Framework for Monitoring**

Article 12 of the Convention instructs the parties to carry out a program of systematic follow-up to monitor and promote the full implementation of the Convention through the Working Group on Bribery. Guidance for the Working Group on monitoring and follow-up is provided in Section VIII of the Revised Recommendation of the Council on Combating Bribery in International Business Transactions (Revised Recommendation). (See Appendix B.)

The key elements of the monitoring program are as follows:

- A self-evaluation provided in responses to the Working Group questionnaire, assessing implementation of the Convention and Revised Recommendation, including whether the country disallows tax deductibility of bribes to foreign public officials.
- A peer group evaluation whereby Working Group members have an opportunity to review the questionnaire and seek clarifications from representatives of the signatory government.
- A Working Group report providing an objective assessment of the progress of the participating country in implementing the Convention and Revised Recommendation.
- Provision of regular information to the public on the Working Group's programs and activities and on implementation of the Convention and Revised Recommendation.

In addition to evaluating implementation by signatories, the Working Group also has responsibility for examining the five outstanding issues not fully covered by the Convention (See Chapter 6 on Subsequent Efforts to Strengthen the Convention).

### **Operation of the Working Group**

To carry out this mandate, the Working Group agreed at its meeting on June 29–July 1, 1998, to certain modalities concerning the systems of self-evaluation and peer group evaluation provided for in the Convention and Revised Recommendation. These modalities are summarized below and are also available on the OECD's public web site at <http://oecd.org//daf/nocorruption/selfe.htm>.

The monitoring process has been divided into two stages, an implementation phase (Phase I) and an enforcement phase (Phase II). The objective of Phase I is to evaluate whether a signatory's implementing legislation meets the standards set by the Convention and the Revised Recommendation. The objective of Phase II is to study and assess the structures and methods of en-

forcement put in place by parties to enforce the application of those laws.

Phase I began in the latter part of 1998 with the issuance of a questionnaire to signatories soliciting information on how their respective laws and legal systems implement the Convention and the Revised Recommendation. Signatories recognized that it would take a considerable amount of time to conclude Phase I given the large number of signatories and the fact that some countries would need longer than others to ratify the Convention and enact implementing legislation. The Working Group was instructed to report on the results of the Phase I review to the OECD Ministers at their annual meeting in the spring of 2000. Phase II is not expected to begin until the second half of 2000, by which time at least some parties will have developed a record of enforcement actions.

The questionnaire contains a comprehensive list of questions on how signatories fulfill their obligations under the Convention and the Revised Recommendation. Signatories are asked, among other things, to

- Provide the dates on which the Convention was signed and ratified, necessary implementing legislation was enacted, and the Convention entered into force.
- Review how each of the substantive provisions of the Convention, from the elements of the offense (Article 1) to extradition (Article 10), is implemented or covered under national law.
- Explain their laws and policies regarding the tax deductibility of bribes, accounting requirements, external audit and internal company controls, public procurement and international cooperation.

To encourage a candid and frank discussion among the Working Group members in evaluating each other's laws, the Working Group agreed that questionnaire responses would be considered "confidential" documents and would not be publicly distributed.

The questionnaire responses are circulated to participants in the Working Group and serve as the primary basis of analysis for each country examined. At the onset of the monitoring process, each signatory provided the OECD secretariat with the names of two experts to serve as lead examiners in monitoring implementation. The secretariat thereafter developed a timetable for countries to be examined. A team of lead examiners drawn from two signatory states conducts the examination with the assistance of the secretariat. At the first monitoring session held on April 12–14, 1999, the Working Group examined the implementing legislation of the United States, Norway and Germany. Additional sessions are

scheduled for Finland, Bulgaria, Greece, Canada, and Korea July 7–9, 1999, and for Japan, United Kingdom, Hungary, Belgium, Australia, Sweden, and Iceland in October 1999.

Several weeks before each Working Group meeting to examine implementing legislation, the secretariat prepares a draft analysis and questions based on the country's responses to the Phase I Questionnaire. The designated lead examiners also prepare advance written questions. The examined country then provides written responses to the secretariat's analysis and to the questions posed. At the beginning of each segment of the monitoring meeting, the designated lead examiners and the examined country have the opportunity to make general opening remarks. The lead examiners begin the questioning and discussion by raising issues that were unresolved during the written exchange stage. A discussion and consultation within the Working Group follows. The lead examiners and the secretariat, in consultation with the examined country, then prepare a summary report and a set of recommendations that must be approved by the Working Group. Working Group members have agreed to keep the summaries and recommendations confidential until the process of self-evaluation and peer group review has been completed and a final report to Ministers produced.

Although Working Group proceedings are confidential, the monitoring process still provides ample opportunities for input by the private sector and nongovernmental organizations. For the April Working Group review, Transparency International (TI) submitted its own assessment of the implementing legislation of all three examined countries. In addition, the American Bar Association provided input with regard to the Foreign Corrupt Practices Act (FCPA) and on how the FCPA had affected the behavior of U.S. companies.

The Working Group also encourages private sector input through other channels. It has had a number of consultations on the Convention with the Business and Industry Advisory Committee and the Trade Union Advisory Committee, two officially recognized OECD advisory bodies, Transparency International, the International Chamber of Commerce and international bar groups. Prior to each Working Group meeting, U.S. delegates consult with representatives of the private sector and nongovernmental organizations to identify issues of particular concern. The United States will continue to advocate broad public access to information on implementation and enforcement of the Convention.

The Phase I process thus far has proven to be highly useful for monitoring implementation of the Convention.

The process is facilitating an open exchange of information among Working Group members and providing opportunities for the private sector to present its views and analysis for consideration.

### **Monitoring of the Convention By the U.S. Government**

The U.S. government is devoting considerable resources to monitoring implementation of the Convention. At the Commerce Department, monitoring compliance with the Convention—and international commercial agreements generally—has a high priority because, as Secretary Daley noted in a recent speech, “Compliance ... is the true litmus test for what we achieve in our negotiations and trade practices.” Other U.S. agencies are also actively involved and making important contributions. The Commerce, State, Justice and Treasury Departments and the Securities and Exchange Commission are working as an interagency team to monitor implementation and enforcement of the Convention. Each agency brings its own expertise and has a valuable role to play.

Participation in the OECD Working Group on Bribery is an important part of the U.S. government monitoring process. Attorneys in the Commerce Department’s Office of General Counsel, the State Department Legal Adviser’s Office and the Justice Department’s Criminal Division make an in-depth review of each signatory’s implementing legislation and information contained in its questionnaire prior to Working Group meetings.

Preparation of this first annual report to Congress has also helped to strengthen the monitoring process within the U.S. government. It has encouraged U.S. agencies to focus on issues of specific interest to the Congress and provided a more intensive team approach to monitoring. In response to the IAFCA’s reporting requirement, the Commerce Department organized an interagency task force earlier in the year to coordinate work on this report and develop initiatives to intensify monitoring of the Convention over the longer term. U.S. embassies in signatory countries have also assisted this process by obtaining information on host government laws and making on-the-scene assessments of progress in implementing the Convention, taking into account the views of both government officials and private sector representatives. These diplomatic reports provided valuable information that we used in our analysis.

The U.S. government has welcomed private sector input in monitoring the Convention. As indicated in Chapter 8, U.S. officials have had numerous contacts with the business community and nongovernmental organizations

on the Convention. We have highly valued their assessments and the expertise that they can bring to bear on implementation issues in specific countries.

In the year ahead, the Commerce Department plans to step up its monitoring of the Convention in several ways.

- Building on the collaborative approach to preparing this report, the Commerce Department will continue to support a vigorous monitoring of implementation. The Department will seek to ensure that we have an integrated strategy which includes expert legal assessments of implementing legislation, outreach to the business community and nongovernmental organizations, appropriate diplomatic initiatives and current analysis of the latest developments on international bribery and corruption.
- The Trade Compliance Center, which serves as the Department of Commerce’s focal point for monitoring compliance with international trade agreements, will give increased attention to bribery and implementation of the Convention. The Center is strengthening its outreach to business and improving its collection and analysis of information on bribery-related commercial problems. The Center is adding bribery complaints to its Internet Trade Complaint Hotline so that U.S. business now has a direct channel to report bribery-related problems. The Center will also, in coordination with other U.S. agencies, prepare future annual reports to Congress on implementation of the Convention.
- The Department of Commerce will continue to seek input from the business community and nongovernmental organizations on the Convention. During the negotiation of the Convention and the period since its adoption, U.S. officials have made a concerted effort to consult with the private sector. In this next phase of implementation and enforcement of the Convention, it is all the more important that U.S. officials and private sector representatives be in close contact.
- The Department of State is also using its Advisory Committee on International Economic Policy to obtain private sector views concerning the Convention and to keep nongovernmental organizations abreast of progress in the fight against corruption.
- The Departments of Commerce and State, working with other U.S. agencies, will support increased diplomatic and public affairs activities on the Convention. Senior officials will include points on the Convention in their meetings with foreign government officials and speeches to U.S. and foreign au-

diances. U.S. diplomatic missions will be kept informed of current developments on the Convention so they can effectively participate in the monitoring process and engage foreign governments in a dialogue on key bribery-related issues.

- Improved research and analysis of current developments on international bribery will also be part of our monitoring plan. The Department of Commerce will track closely information on bribery and corruption revealed in the international press, business publications, and its contacts with private sector and nongovernmental organizations.

The United States has the most intensive monitoring program of any of the signatory countries. It is transparent and open to input from the private sector and nongovernmental organizations. The Clinton Administration will continue giving a high priority to monitoring implementation of the Convention so that U.S. business can fully realize the benefits of this important international agreement.